UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Francesca Gino,

Plaintiff,

V.

President and Fellows of Harvard College, et al,

Defendants.

Civil Action
No. 1:23-CV-11775

April 26, 2024

11:00 a.m.

BEFORE THE HONORABLE MYONG J. JOUN

UNITED STATES DISTRICT COURT

JOHN J. MOAKLEY U.S. COURTHOUSE

1 COURTHOUSE WAY

BOSTON, MA 02210

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P-R-O-C-E-E-D-I-N-G-S

THE CLERK: All rise.

(The Honorable Court Entered)

THE COURT: Today is April 26, 2024. We're on the record in the matter of Gino v. President and Fellows of Harvard College, et al., Case Number 23-CV-11775. Will counsel please identify yourselves for the record.

MS. SACKS: Julie Sacks, counsel for plaintiff.

THE COURT: Good morning.

MS. TARA DAVIS: Good morning, your Honor. Tara Davis for the plaintiff.

MS. FEDERICO: Good morning. Regina Federico for the plaintiff.

MR. BRAYLEY: Good morning. Doug Brayley for the Harvard defendants.

MS. ELENA DAVIS: Good morning, your Honor. Elena Davis for the Harvard defendants.

MS. COOPER: Good morning, your Honor. Jenny Cooper also for the Harvard defendants.

MR. PYLE: Good morning, your Honor. Jeffrey Pyle for the defendants, Joseph Simmons, Leif Nelson and Uri Simonsohn.

THE COURT: Good morning to everyone. So I thought what we would do is I would hear from Harvard first and then

from you, Mr. Pyle, and then I will let you respond to all of them.

MR. BRAYLEY: Thank you very much, your Honor. The claims at issue today, which is not all of them but most of them, ask the Court to second-guess an exhaustive 18-month academic proceeding in contravention of well-established Massachusetts and First Circuit precedent. The complaint, though lengthy, is ultimately implausible and conclusory on the key legal points and, therefore, Counts 2 through 12 must be dismissed.

The complaint asks the Court to superimpose new wished for procedures beyond those that the plaintiff has already enjoyed, but there is no support nor any plausible allegation that the existing policies and procedures were not followed. The handful of allegations that do relate to a breach of a specific policy are simply implausible because they're contradicted by the very documents incorporated by reference in the complaint.

Additionally, the defamation claims against the Harvard defendants must be dismissed because Professor Gino is a public figure and the Court need not look to any extrinsic evidence to make that determination. The complaint makes it abundantly clear with citations to her extensive public profile. Because she's a public figure, it was the plaintiff's obligation to plead actual malice which the complaint does not do.

With regard to the defamation counts against the Harvard

defendants, first, there is an allegation that posting on a website that the professor was on administrative leave was defamation. It was not defamation because it was true, she was put on administrative leave. As to the letters to the journals, they specifically identified that concerns had been raised regarding data, also true, and to the extent that those letters to journals articulated Harvard's conclusions regarding those concerns, that was opinion based on thoroughly disclosed evidence, again, not defamatory with respect to a public figure.

The remaining claims in the complaint against the Harvard defendants are ancillary, insufficiently pled and are legally deficient. I'm happy to go through the counts in the order that they are pled in the complaint unless the Court would like to jump in with any questions.

THE COURT: Yeah, I just had some questions about the interim policy. Did that supersede the 2013 research integrity policy?

MR. BRAYLEY: Yes, it did supersede that.

THE COURT: So that's the official policy today?

MR. BRAYLEY: It is indeed, yes. What I was about to point out though is it is not inconsistent with or contradictory with the 2013 policy. As you've seen from the documents, the 2013 policy is broad and gives the Dean a tremendous amount of discretion. The interim policy then

imposes a great deal of process on Harvard Business School before it can reach any conclusions. So, yes, although it is superseded, I would also point out it is not contradictory.

THE COURT: And when was it officially adopted?

MR. BRAYLEY: In 2021.

THE COURT: And has that policy been applied to anyone else other than Ms. Gino?

MR. BRAYLEY: I'm not aware of that and it's certainly not alleged in the complaint that it has been and we at this stage are confined to what's in the complaint.

THE COURT: Okay.

MR. BRAYLEY: So on the breach of contract claim, I think it's important here to look again at the pleadings which is where we must be focused on a motion to dismiss. The pleadings say that the breach of contract consisted of a violation of the tenure policy and the third statute, the third statute being the name that Harvard applies to its policy with regard to the revocation of tenure. The other concerns that the plaintiff raises in the complaint relating to process or not being given enough time to respond to allegations, those come under her claim for the breach of the implied covenant of good faith and fair dealing.

So focusing on the breach of contract claim, there simply is no plausible allegation in the complaint that the tenure policy has been violated and that's because in Paragraph one of

the complaint, the plaintiff acknowledges that she remains an employee of Harvard and that she retains tenure. That is true today and it's pled in the complaint. Given that, there simply is no breach of contract alleged. There are no contract provisions cited that limit the discipline short of employment termination or short of tenure revocation that can be imposed. There are no contract provisions that guarantee her the right to keep teaching students for any given period of time or while the third statute proceedings may be underway. There simply could be no reasonable expectation that she would be entitled to protection from discipline short of tenure revocation under the third statute, and indeed Professor Gino's position would be ultimately untenable for any academic institution to say that the school lacks the authority to impose any discipline or sanctions short of tenure revocation without going through the really extensive process of revoking tenure and finding grave misconduct. It would imply, for example, that a professor who had been credibly accused of violence or sexual assault could not be barred from campus without going through the full-blown third statute proceeding. That's not a reasonable expectation. It's not what the contract says, and I think this is an important time to point out, as we did in our papers, the long line of cases, both in the Commonwealth of Massachusetts and in the First Circuit pointing out that on core academic proceedings such as tenure matters, such as academic discipline

and student discipline, courts owe a great deal of deference to the internal proceedings of academic institutions. That is not to say, to be clear, that academic institutions are immune from court overview. In fact, it's clear from the cases, for example, the Berkowitz and the Schaer cases, that to the extent there is an allegation of violation of statute, right, so take, for example, Count 1 of the complaint, we are not arguing that Harvard is somehow immune from court oversight there. That is not the subject of this complaint or not this motion to dismiss rather; but when it comes to matters such as breach of contract, breach of the implied covenant of good faith and fair dealing with respect to internal academic proceedings, the courts have said over and over again that absent a violation of a reasonable expectation, the courts should not intrude upon core academic judgments.

So in light of the lack of a pleading with regard to a breach of an express contract and the background principle of non-interference, Count 2, the breach of contract count, simply must be dismissed as implausibly pled.

Count 3 then relates to the implied covenant of good faith and fair dealing. This is, frankly, somewhat vaguely pled because as acknowledged in the complaint and as is clear in the case law, the implied covenant of good faith and fair dealing is not some free-floating common law obligation. It's an obligation that is tied to a contract. There is an obligation

for parties to act in good faith and fairly with respect to a contract. The complaint, Count 3, does not identify which contracts' implied covenant of good faith and fair dealing is being implicated. The count then goes on to allege numerous supposed deficiencies in the proceedings, ways in which Harvard allegedly did not follow its own processes. This again is curious because it implies the interim policy is a contract. It's not pled that it's a contract, Harvard doesn't concede that the interim policy is a contract, and I think I would be surprised if Professor Gino were to admit that the interim policy were a contract because she seems to allege that she never agreed to it and if it was never accepted, how can it be a contract?

The only other document that Professor Gino plausibly refers to with respect to the implied covenant is the appointment letter. This is the very short one-page letter that refers to her appointment as a tenured faculty member of the Harvard Business School. That document, of course, on its face, it's one-page long, contains none of the procedures referred to in the interim policy or in the 2013 research misconduct policy. At most, there is a reference at the end of that short letter saying that this appointment is subject to the policies and procedures of the faculty of Business Administration as they may be amended from time to time.

So not clear what contracts' implied covenant is at issue

here, but if we assume for purposes of this argument, which we do not concede, but if we assume for purposes of this argument that there is an implied covenant claim or there can be an implied covenant claim with respect to the interim policy or perhaps the 2013 research misconduct policy, I can walk through right now in brief why each of the complaints that Professor Gino has with respect to the process simply are not well founded, and I think an initial point before I go through point by point is to point out the extraordinary way in which the investigation committee's final report really is incorporated into the complaint, and therefore, as we argue in our papers, should be considered by this Court in connection with the motion to dismiss. We fully recognize the background principle that the Court should not rely on extrinsic evidence in deciding a motion to dismiss, but there is also well established case law in the District of Massachusetts and elsewhere that when a document is so central to a plaintiff's claims and incorporated into a complaint, that it fairly is part of the papers at issue in deciding whether it has been improperly pled.

Going through the complaint, it relies on the final report for topics such as what burden of proof did the committee apply, did the committee consider alternative theories, was there a bias and unfair investigation, what was the timing of the investigation process, was Professor Gino allowed time to

respond. The complaint also extensively refers to the exhibits to the final report such as the notice of inquiry, Professor Gino's written responses, the draft report and various policies and procedures.

To be clear, we are not asking the Court to adopt the findings or conclusions of the investigation committee report. I think that would not be appropriate in the motion to dismiss stage, but what this Court can look at and what there is precedent for which we've cited in our papers is looking at the process itself. What standard does the investigation committee say that it is applying? What are the dates on which the various notices were given? As pointed out in Professor Gino's opposition, there is no dispute over the authenticity of the final report. There is no claim that this is somehow a counterfeit document. The opposition says that the plaintiff disagrees with the conclusions and disagrees with the inferences to be drawn, certainly, but there is no dispute as to the accuracy and the authenticity of the document itself and what the investigation committee said that it did.

So moving then to the specific arguments that Professor Gino makes with respect to the covenant of good faith and fair dealing. First, Professor Gino says the adoption of the interim policy itself was a violation of the covenant of good faith and fair dealing. Somewhat puzzling because the interim policy imposes far greater procedural and substantive

limitations on the Business School in its investigations into research misconduct than existed under the 2013 policy that was in place at the time of the appointment letter. So, in other words, how could Professor Gino have been harmed by Harvard limiting its own process, limiting itself and imposing onerous processes on itself? Another reason why this cannot support a claim on the implied covenant is that the appointment letter makes clear that this school's policies may be amended from time to time.

Moving then to the next item in Count 3 which is that there supposedly was a violation of the covenant with respect to the committee's consideration of reports -- of publications that were more than six years old. First, notably absent from this allegation is that one of the papers at issue was published in 2020 and so clearly within the six-year window.

With respect to the other three papers, Exhibits 2, 3 and 4 to our motion to dismiss, show publicly available documents published within the last six years in which Professor Gino cited these studies. Professor Gino has no response to this in her papers other than to say these were quote-unquote "lightweight citations," a term that appears nowhere in the interm procedures and therefore cannot plausibly violate any covenant of good faith and fair dealing, and I would point out that to the extent that Professor Gino says that the interim policy itself is inapplicable or should never been passed,

there is no six-year lookback limit in the 2013 policy which she would say was incorporated into the appointment letter.

Next there is an allegation that she was not allowed time to respond to various allegations or that in some way she was rushed in her response to the committee's work. Again, looking at the undisputed facts as laid out in the final report and indeed in the complaint itself, this Court can see that Professor Gino received notice of the concerns raised about the data no later than October 27 of 2021 when she received a formal notice of inquiry. It was not until March 7 of 2023 that the committee issued -- that the investigation committee issued its final report or about 18 months later. In between then, the complaint and the final report together document about ten different opportunities that Professor Gino had to interface directly with either the inquiry committee or the investigation committee to share her point of view. She wrote responses. She was interviewed. Her attorney submitted materials. She submitted comments on various draft reports over and over again. Again, this Court -- although this Court must accept the plausible allegations in the complaint as true, the complaint itself and its incorporated final report show that it's simply implausible that she was not afforded basic fairness with respect to the opportunity to respond to the concerns of the committee.

Professor Gino's next concern is with respect to the

burden of proof. The complaint argues that the committee did not apply the proper burden of proof, that it somehow shifted the burden of proof to Professor Gino. This is probably the most black and white example of why the final report should be incorporated into the complaint, at least for the limited purpose of detailing the process. There on Page 1 of the final report, the investigation committee makes clear the standard of proof that it applied, and it applied a preponderance of the evidence standard to the question of research misconduct. It was only on Professor Gino's affirmative defenses of either honest mistake or some unknown bad actor to which the committee applied the preponderance of the evidence standard to Professor Gino. Similarly, the final report on its face shows that the committee decided and found by preponderance of the evidence that Professor Gino had intentionally, knowingly or recklessly committed research misconduct. So, in other words, there was a specific finding of intent.

Next point on which Professor Gino argues is that the sanctions imposed as a result of these 18-month long exhaustive proceedings were not within the Dean's authority. Again, I would cite to the Pollalis case, for example, the implied covenant cannot override the express terms and agreement, and so to the extent that Professor Gino argues that the interim policy is a contract and, therefore, can have a covenant of good faith applied to it, we would point out that all of the

sanctions that were imposed were expressly spelled out in that policy, and to the extent that she's instead said that the relevant covenant is with respect to the 2013 research policy, we would point out that there are no limitations in that document on the Dean's authority.

Now, she may argue that because there are none listed, the Dean was not authorized to make any sanctions under the 2013 policy but that's belied by the plain language of the document which says that the Dean may take such measures as he or she deems appropriate, and I think on that point I would also refer back to the numerous cases we cited in our papers talking about courts' reluctance to impose policies and terms on universities in particular in the academic context. That is count -- or sorry, one more in Count 3. She also says there was a breach of an implied covenant with regard to confidentiality. Again, we would point to the Enstar case, the Pollalis palace case, for the proposition that the express terms govern. The interim policies do state that for sound reasons the proceedings will be kept as confidential as possible and only disclosed to the extent necessary or advisable.

The first point is that the alleged violations of this confidentiality promise occurred after the investigation had been completed and so, therefore, not during the time that the policy was in place or that policy applied. Second, to the extent that that confidentiality policy outlived the running of

the investigation committee's process, they were indeed, to the extent necessary or advisable, they were, for example, to the very students working under Professor Gino and whose reputations and publication work was most at jeopardy as a result of what was happening.

THE COURT: So the school's position is if there was a confidentiality agreement, that it was only valid during the investigation process itself, but once conclusions have been made and certain findings have been made, that it didn't apply anymore?

MR. BRAYLEY: I think that that's the clear reading of the confidentiality assurances in the interim policy, and the reasons for that are straightforward which is that before there has been a conclusion with respect to research misconduct, it's in everyone's interest for the matter to keep confidential to protect the potentially wrongfully accused. Once the finding has been made that by a preponderance of the evidence someone has intentionally, knowingly or recklessly committed research misconduct, the same considerations simply are not in play.

THE COURT: And just as a matter of clarification on the facts, did Harvard share with the Data Colada defendants the results or the school's findings?

MR. BRAYLEY: No. It is not alleged in the complaint either that the Data Colada folks did not see the final report at any time until they were put in the --

THE COURT: Well, maybe not the report itself but the ultimate conclusion.

MR. BRAYLEY: Well, the ultimate conclusion was made clear, for example, in the retraction suggestions to the papers.

THE COURT: Sure, but not directly to the Data Colada defendants?

MR. BRAYLEY: I'm not 100 percent sure of the facts so I don't want to misrepresent anything. I don't think that anything is clearly alleged in the complaint with regard to that.

The next count in the complaint is with regard to estoppel. So this one I suppose is pled in the alternative because it's clear that it is not available if there is a contract so I suppose this is Professor Gino saying even if there is no contract, there was some sort of violation. Under well-established Massachusetts law, estoppel can only be there if there is a definite and certain promise. Here, the only promise that she's alleged to have relied upon is a vague assurance of nondiscrimination and basic fairness which is not specifically articulated anywhere.

If you look at cases such as the Rodden case, the Egan case and the Ciccone case, those all point out that a promise needs to be definite, concrete and intended to be relied upon. Here, Professor Gino cites no case in which a vague assurance

regarding nondiscrimination has turned into an estoppel claim. We're not aware of any cases like that, and indeed, just thinking it through, that would suggest that the common law claim of estoppel would either supersede or be a part of essentially every claim under Title VII, Title IX or Chapter 151B in Massachusetts. There simply is no authority for that proposition.

Moving on then to the defamation counts against the Harvard counts, and I will leave, of course, the defamation counts against the Data Colada defendants to Mr. Pyle, the first point is that, as I already mentioned, Professor Gino is clearly a public figure. Although, in some circumstances, that would require looking to extrinsic facts to determine. Here, that simply is not the case. The complaint is thorough in reciting her various professional accomplishments, her 140 articles, her listing of the 40 top business professors, her extensive media contacts, she has top-selling books, she has speaking engagements at top corporations, all specifically relating to her research and the findings of her research, and indeed her claims, Professor Gino's claims for damages relating to the alleged damage to her reputation, would make no sense were she not a public figure. Her reputation and her potential from speaking to these corporations is precisely because of her public fame and notoriety.

Therefore, under well-established Supreme Court precedent

and precedent in the First Circuit and the Commonwealth of Massachusetts, because she's a public figure, defamation claims can only survive if there is actual malice which is to say knowing that a statement is false or having serious doubts about its truth. That simply is not alleged with respect to the two types of defamation alleged against the Harvard defendants.

So taking a look at the notice of administrative leave, so the allegation here is that Harvard defamed Professor Gino by posting on her bio on the website on administrative leave, there is no allegation of actual malice that Harvard knew that this was false or had serious doubts about its truth because it was true. She was in fact placed on administrative leave.

THE COURT: Let me ask you this, does Harvard update its website to reflect that a professor is on, for example, sabbatical leave or maternity leave or some other leave?

MR. BRAYLEY: Well, it's not pled in the complaint one way or another.

THE COURT: I'm just asking.

MR. BRAYLEY: My understanding is that they do and there is certainly good reasons why they would do so, to prevent confusion about who was or was not available for comment. For example, sometimes Harvard professors, actually not infrequently, Harvard professors will be on leave to serve in government administration and it's important to understand

in what capacity those individuals are working during the period of leave.

THE COURT: So their status is updated regularly? It's not just Professor Gino?

MR. BRAYLEY: No. I don't believe that to be true, and I don't think it's pled and I don't believe it to be true in any event. There has been no disparate treatment here. To the extent she would argue disparate treatment, that would be with respect to the Title IX claim that isn't the subject of today's motion.

With respect to the letters to the journals, these, of course, were sent by Harvard in connection with its obligation as a leading academic institution to make sure that there is a correct academic record and despite the mischaracterizations of those letters in the complaint, the letters are attached to the complaint and incorporated into it, and this Court can see that the statements do not actually accuse Professor Gino of anything. They say, for example, that the university has reviewed concerns about certain data previously published by Dr. Francesca Gino in the following article.

First of all, that is not false. The university did review concerns about certain data. Second, when they then go on to explain the basis for their concerns about the data, that is opinion based on disclosed evidence, and there is nothing in the complaint that plausibly alleges that Harvard knew or had

serious reason to doubt the truth of what it was saying to these journals.

The only, in the opposition papers, Professor Gino's only response to this point is to say that the letters to the journals say original data when she wishes that they simply had said earlier data. She disputes whether the Business School analyzed that it believed it was original data that was truly original. That's the only falsity alleged. Couple of responses to that. First of all, it's substantially true. Whether or not it was the original, original data or just an earlier investigation of the data, it's still substantially true. It doesn't go to what's supposedly defamatory about these statements. What Professor Gino is objecting to is the conclusion that she committed research misconduct. She would not be saying that these statements were defamatory if Harvard had said we analyzed the original data and the data publicly filed and found they were the same. She would not say those are defamatory which shows that the question of original versus earlier is irrelevant to the question of defamation. There is no question about its truth or substantial truth in that regard.

And, finally, and I don't think the Court even needs to get there, it's important to point out an employer's conditional privilege to make statements that are not unreasonable, unnecessary or excessive with regard to the

posting on the website that Professor Gino was on academic leave, we've talked about the various reasons why this would be important, so there is no confusion about in what capacity she's operating during that leave, and with respect to the letters to the journals, these were limited to the journals, publishing the four papers that were at issue in the investigation. There was no broad-based letter writing campaign to other journals or other academics. It was limited to those journals where there was reason to believe that there may be concerns about the data published in those journals.

Briefly on the last few claims that are relevant to the Harvard defendants, the conspiracy claim, it's a single conspiracy claim that's entirely derivative of the defamation counts and actually primarily the defamation counts against the Data Colada defendants so I will let Mr. Pyle address why those counts must fail, but we share that belief that the counts against the Data Colada must fail as a matter of law, and therefore, the civil conspiracy claim cannot stand. The Mullane case, for example, stands for the proposition that if the underlying conduct doesn't stand, then the civil conspiracy case cannot proceed either.

Two more, intentional interference, there is no allegation that Harvard defendants interfered with a contract, and so then the claim must be that there is interference with an advantageous business relation. The elements of that count

under Massachusetts law include that the business relationship must have been broken. That's the language. There is actually no allegations that any business relationship with Portfolio, the publisher, was broken. The allegation in the complaint was there was a one-year delay in publication.

With respect to the allegation of interference with Harvard Business publishing, first, I would point out that this is a claim for intentional interference. There is no allegation that the Business School or Dean Datar instructed Amy Edmondson to contact Portfolio so not sure how it could be intentional against the defendants named here. With respect to the subsidiary publishing company, there is no allegation of actual malice or ill will as would be required for interference with one's own corporate affiliate.

Finally, with respect to the privacy claim, as pled in the complaint, this is relevant only to the posting of administrative leave on the website, yet the clearly established case law in Massachusetts is that a privacy claim can stand only where the information disclosed is highly personal or intimate. We have not found and we haven't seen the plaintiff cite any case that suggests that the mere fact that an employee is on administrative leave is this sort of highly personal or intimate information that can give rise to a privacy claim, and by contrast, we cited cases, for example, where asking co-workers about someone's alleged alcoholism was

not sufficiently personal or intimate or supported by legitimate business reasons and, therefore, did not sound of privacy claim under Massachusetts law.

Those are my points. I'm happy to answer any questions the Court may have.

THE COURT: I think I'm all set.

MR. BRAYLEY: Thank you.

MR. PYLE: Good morning, your Honor. Jeffrey Pyle for Joseph Simmons, Leif Nelson and Uri Simonsohn. I would like to point out my clients are here in the courtroom today. They have flown here from their respective institutions in California, Philadelphia and Barcelona, Spain for this hearing today.

There are three reasons why the First Amendment requires the dismissal of all claims against my clients. First, their statements are opinions based on unchallenged, truthful, disclosed non-defamatory facts, and the First Amendment protects opinions like that, especially in the realm of scientific discourse and debate.

Second, Professor Gino, as my brother has ably argued, is a public figured. Therefore, must prove actual malice and the same failure of proof as to Harvard applies to my client. She has alleged no facts showing that they did not believe what they said or that they lied in their analysis of the data anomalies that they identified to Harvard and then to the

public. That is required by the First Amendment. The complaint fails that test.

Third, Professor Gino's add-on claims of conspiracy and tortious interference fail for the same reasons as the defamation claims as Mr. Brayley has also argued. As I said, my clients are professors at UPenn, Berkeley, and Esade in Barcelona, and in their spare time, they're data investigators. They identify suspicious data in published studies and they expose potential fraud. They do that, not for money, but because they want to improve their field of behavioral sciences and they publish their analysis on their blog which is called Data Colada, a fun name for a blog about data.

In this case, they identified suspicious data in four studies published by Professor Gino. My clients have extensive experience in identifying fake data, and it looked to them like the data for these studies was manufactured to create more successful outcomes. They reported their suspicions to Harvard in December of 2021 in an 18-page memo full of graphs, analysis and statistical methodology, all of which is in Exhibit A to my affidavit, and they said, here is why we think the data looked fake, but Harvard Business School, you should investigate this. What you should do is you should obtain access to the original data that was collected for these studies and compare it to the posted data, the data that was posted publicly, and we think what you'll find is that the data was modified between the time

it was collected and the time it was published in order to create a more successful outcome. That will either confirm or disprove our tentative conclusions based on the data that we see, and by the way, you should give Professor Gino a full opportunity to explain the anomalies to you.

Harvard did exactly that, and Harvard's investigation report, Exhibit 5 to the affidavit of Ms. Cooper, shows that everything my client said in their report to Harvard was correct. My clients didn't have access to Professor Gino's original study data, but they said based on the anomalies we see, we think it's modified from the original data to the published data. Harvard got access to those original data sets, and sure enough, my clients were right, and the scope of the fraud in fact was a great deal more than what my clients were able to identify just by looking at the anomalies.

So Harvard issues -- the next thing my clients hear about this is 18-months later that Harvard issues public retraction notices for these four studies and put Professor Gino on administrative leave, and to answer the Court's earlier question, no, Harvard did not communicate with my clients about the results of the study. We found out the same time everybody else did in the news media with an article in the Chronicle of Higher Education.

Now, Professor Gino could have responded to this circumstance in the Marketplace of Ideas. She could have

publicly defended her research and tried to convince the world that her data isn't fake. Instead, she has sued my clients for $25 million and for what? For identifying data anomalies to Harvard and writing publicly about those anomalies after, after Harvard confirmed that everything they said was right.

The chilling effect of a lawsuit like this on science is obvious. It is not an exaggeration to say that the very idea of science depends on scientists checking each other's work, and that kind of checking and identification of potential data manipulation leads to lawsuits that get to discovery and the burdens and expense of litigation. Very few people would do what my clients have done, which is to go out and try to identify fake data for the betterment of science. They have been sued for a public service. It would greatly harm the public and the public's interest in good science for this case to proceed any further, and that is where the First Amendment comes in.

I'd like to begin with the law of opinion which you've already heard a little bit about. Everything that Data Colada is accused of saying here, everything, all five publications, fit comfortably within the law of opinion. The defamation claim requires a false statement of fact. The Supreme Court has said and the lower courts have said that repeatedly that statements that amount to opinions are protected against liability, and in the law, the shorthand for opinions includes

statements that express the speaker's subjective judgment or interpretation about what facts show.

So, for example, someone says, Attorney John Smith is an alcoholic. That would be a defamatory statement. It's intended to harm the attorney's reputation, it's provable as false, and if said with a required level of fault, it would be actionable; but if someone says, I saw Attorney Smith drink a beer yesterday at lunch just before an important court argument and the previous night I saw him go into a bar after work and from that I conclude that Attorney Smith must be an alcoholic. That conclusion, he must be an alcoholic, is not an actionable statement in defamation because the speaker discloses all the facts upon which the conclusion is based and lets the listener or the reader decide whether or not that opinion, that conclusion, is justified and that's what my clients did here. They identified anomalies in Professor Gino's published data, they analyzed it with charts and graphs and statistical analysis and they explained why in their opinion the anomaly suggested that someone manipulated the data. They disclosed all the facts both to Harvard and to the public on their blog. They even hyper linked to the underlying data sets so that others could run the same analysis and check their work as good scientists do.

Their conclusions are an open book based on disclosed, unchallenged, non-defamatory facts. It is a classic case of

protected opinion. This, by the way, is strictly an issue of law. The Court can determine whether or not my client's statements are opinions based on their publications alone. It's not a factual issue and many cases have so helped.

Also, you don't, as Mr. Brayley mentioned, you don't have to accept mischaracterizations of what my clients have said in their publications that are made in the complaint. The publications are what control.

Now, Professor Gino has boilerplate in her complaint saying that there are undisclosed facts that underlie my clients' opinions but she doesn't really say what she means by that. Her real beef with my clients' analysis is that she calls my conclusions "unwarranted," her word. She uses that word at Paragraphs 104 and 105 of the complaint. She says, they should have assumed that there were innocent explanations for these issues, but you can't sue somebody for drawing the wrong conclusions about what the facts show. That's standard Hornbook law of opinion. That's what my clients are being sued for.

Now, she will say and her counsel will say and has said in her brief that the statements that was whether or not she committed data fraud or whether data fraud existed in her studies are provable as false, and therefore, they're not opinion, but provability of falsity is only one aspect of the opinion case law. The case law also says, and the case Riley

v. Harr stands for this, that even a provably false statement of fact is non-defamatory, non-actionable if it is based on disclosed non-defamatory facts, and it's clear that the speaker is drawing their conclusions from those facts, and I'd like to bring the Court's attention to a case that was decided just last month after our briefing in this case that is squarely on point with this one. It's called Cassava Sciences v. Bredt and it's out of the Southern District of New York and the Westlaw cite is 2024 WL 1347362. I have paper copies of the case if the Court would like me to hand them up. The plaintiff in that case was a biotech company that was developing an Alzheimer's drug and the defendants included a group of neuroscientists who found data anomalies in the company's clinical trials for the Alzheimer's drug. So the neuroscientists sent a 40-page report to the FDA outlining those anomalies and explaining why they appeared to show data manipulation, just like this case. They told the FDA they should do a rigorous audit of the plaintiff's research, just as my clients asked Harvard to do, and they did public presentations about their findings too, and the drug company sues them for defamation saying you've impugned your research integrity, you've harmed our reputation. The Court dismissed the case based on the law of opinion and the absence of actual malice, exactly what we are arguing here. The Court held that the neuroscientists had fully disclosed the non-defamatory facts on which their conclusions were based and

held, importantly, and I think this is an important principle for this case, that a scientific disagreement isn't a proper subject for a defamation claim. Courts and lawyers and juries are ill-equipped, this Court observed, to referee scientific controversies about what data shows, and we've cited cases that make the same point in our brief, ONY Therapeutics which the Cassava Court cites and Saad v. American Diabetes Association by Judge Hillman in this court, all making the same point, when you have a scientific disagreement and the scientists put forward the basis of their concerns, you can't sue somebody over that, it's protected by opinion, and the Court goes on in the Cassava case to say that if the case were allowed to proceed, it would be dangerous to science. If the plaintiff's position in that case were correct, the Court says, a direct developer could sue its critics "no matter how thorough and earnest the reasoning expressed by the scientist for her concerns so long as the drug developer alleged that those concerns were unfounded and presented competing analyses in support of that claim. Such a result risks stifling scientific debate and undermining the vital role of whistle blowers in scientific discourse both in the academy and industry." Therefore, the Court dismissed the case. We submit the Court should do the same here. Cassava Sciences is on all fours with this complaint.

Now, there is one allegation in the Amended Complaint

where Professor Gino says that the underlying facts were not disclosed and this is a statement in Blog Post Number one, that there were perhaps dozens of other cases where Professor Gino may have also or where Professor Gino's data may also be fake, and statements like that the cases say really have to be read in context. When a statement is clearly speculating about what evidence would show based on inferences to be drawn from what they found so far, that also is not a statement of fact, and here you had four separate studies that my clients identified as containing fake data, published over ten years while Professor Gino was at different research institutions, and essentially, their statement was she's published 140 papers, there is no reason to believe that these four are the only ones where her data turns out to be fake, and cases say that speculation like that, complete with the word perhaps which precedes the word dozens, becomes a qualified statement that is not a statement of fact. It is a statement of speculation and not actionable.

Now I'd like to address the second issue I mentioned which is the absence of pleaded facts showing actual malice. I won't rehearse what Mr. Brayley said about how the plaintiff has clearly pleaded facts showing that she is a public figure. I would simply also point out that the case law also says that whenever someone puts research and writing and academic articles out into the public, they become a limited purpose

public figure for the purposes of commenting on that research. There is a Seventh Circuit case that we've cited to that nature. Professor Gino invited comment and the criticism of her work when she put that work out into the Marketplace of Ideas. She is a public figure for purposes of discussion of her research, especially with all the attention that her research has gotten in the public. So she has to plead facts plausibly showing that my clients either lied in their statements or that they did not genuinely, honestly believe what they said but rather harbored subjective serious doubts about the truth of what they actually said in the articles, and there is no evidence pleaded in the amended complaint showing my clients harbored any doubt that these studies had anomalies that pointed to fraud and that is the crux of what the allegedly defamatory statement would be.

Many times a liable plaintiff would say that the conclusion is so outlandish that it would have seemed implausible to the speaker to reach the defamatory conclusion, but as you can see in the December report my clients provided and the blog posts, the data just objectively looks fishy even to someone who isn't trained in statistical analysis. So for example, you have survey responses asked to write down their class year. Most of them put down freshman, sophomore, for their graduation year, but a bunch of them mysteriously put down the word Harvard for their class year and those responses

were all bunched together in one portion of the data set and all those responses just happened to have provided other answers that very strongly supported the study's ultimate conclusion. That looks like fishy data and that's what my clients said to Harvard, and as it turns out, Harvard's investigation, which you can see in Exhibit 5 to the Cooper affidavit, would later find that those Harvard class year study participants were manufactured. They don't appear in either of the original data sets recovered in the investigation. So my clients were right. Those Harvard responses were fake, and yet Professor Gino is here suing them saying they couldn't have possibly even believed that what they said was true when in fact it turns out to be true.

We'll take Blog Post Number four which is about the study that Professor Gino did in 2020. The hypothesis is that if a person is primed to think about their hopes and dreams and aspirations before they attend a networking event, they will enjoy it more than if they think about it as an obligation, and different groups had to rate how they felt about a networking event based on adjectives like dirty, inauthentic, impure, ashamed, wrong, and they had to put a number, like do you feel really dirty, seven, or not dirty at all attending a networking event which would be one, but they also were asked to write down words describing how the networking event would make them feel. What my clients found out is that the numbers put down

by some of the participants didn't match the words that they independently had written. So somebody would write, yeah, a networking event would make them feel really inauthentic but when you look over at the numerical responses on the inauthentic, they put down a one for not being inauthentic at all. There wasn't just a few of these. There was like 26 of them that my clients identified as being non-matching where you had the same words but completely non-matching responses, and as it turns out, Harvard's forensic firm found out that that is exactly what had happened. Whoever fudged the data had changed the numbers but didn't bother to change the word responses and that's why Blog Post four is called Forgetting the Words, but the data wasn't just changed in 26 entries. Someone changed the data in 168 entries all in a direction that the study authors wanted the study to go. That is set forth on Pages 516 to 520 of the Harvard report, and what is Professor Gino's response to Harvard? Well, the report says that her excuse was someone must have hacked my account. The evidence of a data fraud was so bad that that was the defense, somebody must have hacked my account and made these data sets look different because I can't otherwise explain it, and you know who might have done it, it might have been the Data Colada team. Who is defaming who here?

Harvard found her bad actor explanation totally implausible last summer, and apparently, when Professor Gino

decided to file her complaint, they decided that it was implausible here too so it's not included in this lawsuit, but the notion that my clients disbelieved that the data anomalies pointed to fraud is not plausibly supported in the complaint. That is the burden she has to bear and she has not borne that burden.

I will also, finally on this point, point out that the blog posts are particularly deficient as to actual malice because as I said earlier, the blog posts were all posted after it had become public knowledge that Professor Gino's studies had been retracted by Harvard, very unusual thing to happen and that she had been put on administrative leave. So at that point my clients knew or reasonably could have inferred that Harvard's investigation had validated their concerns and that their concerns were right. So how can it be said that they disbelieved what they had reported to Harvard as of the time they published the blog post? There is clearly no evidence of actual malice as of that point.

What Professor Gino does do is she points to an interview by Professor Simonsohn where he says, we don't know exactly who fudged the data. I think it was Professor Gino but suppose it was somebody who did it on her computer somehow, we wouldn't know that. That just shows Professor Simonsohn being careful, like a good academic saying what he knows and what he doesn't know. It's not evidence that they disbelieved anything they

said about the fake studies.

Now, finally, as to the ancillary claims of conspiracy and tortious interference, both of them, as Mr. Brayley said, depend on there being a valid libel claim because the law is very clear that if you fail the law of defamation because the speech is protected by the First Amendment, you can't get around the First Amendment by repackaging your libel claim as something else, and that's what both of these counts try to do. They also totally fail on their own terms.

On the conspiracy count, the complaint concocts this implausible scenario where my clients threaten to go public with their concerns about Professor Gino unless Harvard agreed to create a new employment policy to investigate the allegations against plaintiff's work. First of all, why would Harvard negotiate about its policies with three professors who work for other institutions? It's not a plausible allegation, and the Court need not credit fanciful, implausible allegations in the complaint that don't have any factual heft. This meets that categorization, and why would my clients care what procedures Harvard used anyway? It's not a factual allegation that makes any sense. It's just an attempt to try to make an agreement where there wasn't one. There is no evidence that she has any insight into what they agreed or what they said or what their understanding was.

That claim fails also because it's pointless because the

whole purpose is to try to hold, appears to be, try to hold Harvard liable for what my clients said and try to hold my clients liable for what Harvard did and said. That is not permissible under the law of defamation. You can only be sued for a statement you participate in or that you direct or that you order. You can't be sued for a statement somebody else made and there is no pleaded allegation that my clients had anything to do with Harvard's retraction notices or that Harvard had anything to do with what my clients said.

Finally, as to tortious interference, there is no plausible allegation that my clients induced Harvard to break any contract with Professor Gino. They said, Harvard, here are our concerns about data anomalies. You should investigate them. That's not inducement to break the contract and apply some different standard than what Professor Gino reasonably expected. That's what's required in a tortious interference claim is intent to cause the other party to breach the contract, intent to cause the other party to conduct an investigation while giving Professor Gino an adequate chance to respond, as my clients asked Harvard to do, is not tortious interference with anything.

So to sum up, unless the Court has any additional questions, the complaint challenges speech that is absolutely protected by the First Amendment. The communications were statements of opinion, there are no allegations plausibly

showing actual malice, and the tagalong claims of tortious interference and conspiracy fail as well. We request that all counts against Joe Simmons, Uri Simonsohn and Leif Nelson be dismissed.

THE COURT: Thank you. Ms. Sacks.

MS. SACKS: Good morning, your Honor. Before I get into the heart of the argument, I would just like to respectfully remind the Court we're here on a motion to dismiss, two motions to dismiss. It's not appropriate at this stage for the Court to be weighing evidence or facts as to what are true. Our client obviously maintains that the statements are fact, not opinion, that she engaged in fraud is verifiably false, and it's not appropriate at this stage to decide whether there's truth of these statements of facts or the falsity of these statements.

THE COURT: But to the extent that there are statements contained in the retraction letters, for example, to the extent that there is any contradiction with what is alleged in the complaint, I can rely on the letters themselves, you would agree?

MS. SACKS: I would agree that in terms of what the complaint describes as being the retraction letters can be considered by the Court, but as to what the content and the substance of the retraction letters themselves, they consist of hearsay, and as alleged in the complaint, and I want to kind of

keep that in the argument, but as alleged in the complaint, the retraction notices themselves are filled with false and verifiably defamatory statements of fact that Professor Gino engaged in fraud. They also contain defamation by innuendo with their mash-up of unattributed forensics analyses which are not the entire analysis so they exclude exculpatory and limiting material that was in the forensics reports of Mainstone and they combine them with a December report, what was called the December report, an earlier submission by Data Colada and so it gives the impression that Data Colada's accusations were ultimately vetted and proved by -- it's unclear. It's, frankly, unclear and it leads to -- I will explain that more in the argument, but I also want to say just as an initial matter, on a motion to dismiss, it's wholly inappropriate for counsel to testify on behalf of their clients, and this morning, we heard Mr. Pyle speak to what was actually communicated between Harvard and Data Colada. We heard Mr. Pyle speak about what his clients believed as to the evidence of their allegations.

THE COURT: I think one of them was in response to a question that I had posed

MS. SACKS: It was but at this stage --

THE COURT: I understand. I understand your point.

MS. SACKS: He can't speak. He should not be -- his opinion as attorney, he's a zealous advocate, but he's not a

fact witness. He also even really testified as to the quality of the data that was at issue in Data Colada's blogs. Wholly inappropriate at this stage for the Court to make determinations about those studies. These are issues of fact.

The other point I would say is that he also spoke to what is the original data. We don't even know yet what data, what universe of data, Mainstone examined and whether or not -- our client disputes the term that it was original. Without getting into the facts, because this isn't a factual dispute at this stage or shouldn't be, behavioral scientists have stages of data. So just as background information, your Honor, when data sets are produced, they go through multiple stages, data is cleaned. So, in other words, if a participant in this study gives answers to questions that are duplicative or nonsensical, that data comes out. We don't know what the world -- data sets can change, and we know here that Professor Gino, as alleged in the complaint, disputes what has been referred to as the original data and the characterization of so-called discrepancies between what she voluntarily posted on something called the Open Source Framework which is a place where the public can see the data set and the false statements of fact attributing so-called discrepancies as to being the result of fraud. So I just want to point that out, that, you know, this is -- zealous advocacy is one thing but testimony on a 12(b)(6) motion is another.

This case presents too many issues, and the first is whether a university is free to disregard the procedural protections afforded to tenured professors by the terms of appointment letters and written policies. The second is whether the First Amendment immunizes from liability statements that destroy someone's professional reputation with false accusations of dishonesty.

At this stage in the pleadings, this Court should find in favor of Professor Gino. First, under rulings of Massachusetts federal and state courts, it is well-settled that the procedural protections that universities guarantee to their tenured professors in the form of appointment letters and written policies constitute enforceable and contractual rights. Second, there is no constitutional opinion privilege immunizing false and defamatory statements from liability.

Now addressing the first issue, Professor Gino has plausibly alleged contract claims against Harvard, both with respect to breach of contract and with breach of the implied covenant of good faith and fair dealing.

I respectfully refer your Honor to two cases cited in plaintiff's brief which were decided by another session of this court, Sullivan v. Western New England University and Barry v. Trustees of Emmanuel College. Both of these are discussed in plaintiff's memoranda, but as those cases indicate, federal and state courts in Massachusetts recognize that appointment

letters which incorporate written university policies can, in the circumstance of this case as presented here, constitute a binding contract.

Now, there was some mischaracterization by Mr. Brayley concerning what the appointment letter and the terms of the policies incorporated therein actually conveyed to Professor Gino. Professor Gino's appointment letter conferred on her under Harvard's own policies, when they conferred on her her tenured appointment, they conferred a lifetime appointment. The appointment letter specifically states that Professor Gino's appointment was subject to such terms, condition and policies -- sorry -- subject to such terms, conditions and policies as are stipulated by the faculty of the Business Administration and to the third statute of the university. That's important because I didn't -- that term stipulated by the faculty of the Business Administration means that the Harvard Business School was not free to create a new employment policy for one tenured professor, Professor Gino, that would purport to supersede the stipulated policies.

So to Professor Gino's appointment letter, a copy of the third statute was attached. Under the terms of the third statute, Professor Gino, like all tenured professors at Harvard at the Business School and outside the Business School, was subject to removal from her appointment by the Harvard Corporation only for "grave misconduct or neglect of duty."

In 1971, Harvard's governing body adopted a policy entitled "Discipline of Officers Tentative Recommendations," and that's referred to throughout the complaint and in the memoranda as the Discipline Policy. The Discipline Policy adopted by the Harvard Corporation is also incorporated in Professor Gino's appointment letter. It sets forth the procedures specifically for the discipline of tenured faculty for grave misconduct or neglect of duty.

I know that in Harvard's memoranda, memorandum, it contends that -- it quotes from the preamble to try to argue that the Discipline Policy only concerns removal of appointment, but, in fact, the Discipline Policy doesn't do that. It governs the procedures for discipline. Under the Discipline Policy, before imposing discipline on a tenured professor, Harvard must prove grave misconduct or neglected duty by clear and convincing evidence following a full evidentiary hearing before a hearing committee and a decision by the President and governing bodies of Harvard.

In this case, after receiving erroneous allegations regarding Professor Gino from Data Colada, the Harvard defendants abandoned their preexisting research misconduct policy and faculty review board process and created a new policy just for plaintiff, the so-called interim policy. The interim policy that they created purported to supersede the terms of Professor Gino's tenured appointment by authorizing

the Dean of Harvard Business School to impose on Professor Gino sanctions up to and including termination of her tenured appointment.

Following an investigation conducted by Dean Datar's handpicked investigative committee, Dean Datar imposed substantial discipline on Professor Gino. It was tantamount to dismissal without regard to her contractual rights as a tenured professor. Specifically, Dean Datar placed Professor Gino on unpaid leave for two years. He stripped Professor Gino of her entire compensation including 100 percent of her base salary and benefits and barred her from campus and all research.

Harvard does not dispute that it did not follow the Discipline Policy, but it makes two main arguments. First, it contends that the policies were not contractual in nature. Harvard cites to inapposite cases in which courts have applied a multi-factored test to determine if a handbook creates enforceable rights, but none of the cases Harvard cites to involved a tenured professor at a university.

Second, all of the cases Harvard cites to involved at-will employees and employment policies that expressly disclaimed any contract rights, and an example of one of these cases would be Lee v. Howard Hughes Medical Institute and they discuss a 2020 case, again from another session of this court, and they discuss the so-called Jackson factors where Massachusetts state courts have applied analyses to determine if a policy creates a

binding contract. None of those factors apply here. Professor Gino's appointment letter specifically called attention to these binding policies. Professor Gino's appointment letter never disclaimed that those policies were binding on her employment.

Harvard also, as I mentioned, quoted selectively from the preamble to somehow say, oh, the Discipline Policy only applies to the revocation of tenure, but again, that's not what the Discipline Policy actually states, and to the extent that there is any ambiguity in the contract language, at this stage of the pleading, all plausible inferences need to be decided in the plaintiff's favor.

Plaintiff's opposition memorandum references an illustrative case that I would respectfully refer your Honor to which is Sullivan v. Western New England University. Again, a case -- another case decided by a different session of this court in which similar to the present situation, the Court denied the employer's 12(b)(6) motion on a breach of contract claim. In that case, a tenured professor was found to have plausibly alleged a claim for breach of contract where the university had terminated his employment under a generally applicable university policy without invoking the just cause provisions as the reason for his dismissal and also without following the requisite procedures due to a tenured professor. In that case, there was a generally applicable policy that

covered disability leave, that Western New England University fired the terminated professor for exceeding his disability leave. In that case, Judge Sorokin held that there were two reasons that the employee successfully stated a breach of contract claim on the 12(b)(6) motion. One, is the basic rule that a specific provision outweighs a general provision; Two, the judicial solicitude that courts in Massachusetts, federal and state, had given to the procedural protections of tenured professors.

Here, Professor Gino's complaint plausibly alleges a breach of contract based on Harvard's failure to adhere to the procedural protections to which she reasonably expected under the terms of her appointment letters and Harvard's written policies that were incorporated therein, and that is the fundamental principle that this Court should consider in analyzing at this stage whether she plausibly states a breach of contract claim is given the policies at issue were her expectations reasonable given the manifestations of the university and the meaning that it could have reasonably expected Professor Gino to understand.

Professor Gino has also plausibly stated a claim for breach of the implied covenant of good faith and fair dealing. The covenant of good faith and fair dealing exists so that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive

the fruits of the contract. As alleged in the complaint, there are ample facts to support a plausible inference that Harvard breached that duty of good faith and fair dealing.

First, at the time Harvard received the erroneous allegations against Professor Gino, Harvard Business School already had a research misconduct policy, the Research Integrity Policy, and something called the Faculty Review Board Process, the FRB process, that it had used to examine allegations of research misconduct at the Harvard Business School. As alleged in the complaint, Harvard Business School had only recently applied this pre-existing policy and procedure to a male junior faculty member who had been accused of research misconduct in 2019. Harvard chose to deviate from this existing policy and procedure, which, pursuant to the terms of Professor Gino's appointment letter, had been vetted by the Harvard Business School, and they kept her in the dark of the allegations while they crafted a new policy just for her.

While counsel for Harvard can't testify as to whether or not Harvard deviated or has never before created a policy for just one employee or whether Harvard has ever applied the interim policy to any other employee, at this stage, the Court should respectfully look at Professor Gino's complaint because, as alleged in the complaint, Harvard has never, Harvard Business School has never created a policy, an employment

policy, for just one person and has certainly never created an employment policy that purports to take away the procedural protections afforded tenured professors at Harvard.

The new interim policy that defendants created just for plaintiff was never vetted or adopted by the Harvard Business School as required under the terms of plaintiff's appointment letter. While it is true that the existing Research Integrity Policy that had been established in 2013 had given the Dean discretion to take action as he thought appropriate, it was a generally applicable policy that applied, could have applied to a tenured or non-tenured professor. That policy didn't purport to authorize the Dean to impose discipline on a tenured professor that would supersede the protections provided by the third statute of the Discipline Policy.

In this case, the interim policy that Harvard created, it created it just for Professor Gino and specifically purported to authorize Dean Datar to take actions up to and including termination. That's ample factual support for an inference of bad faith when the employer creates a policy for one employee specific to her that will undermine the terms of her appointment.

Defendants, the Harvard defendants, also contend that the language in the interim policy authorize the Dean to impose the severe sanctions on plaintiff that it did -- that he did, but again, the Harvard defendants cannot point to an

extra-contractual policy that was never vetted by the Harvard Business School as authority for its actions.

Harvard also states that, well, if the Dean were unable to take this action, this would be a policy issue because it would limit an employer's actions -- it would limit Harvard from taking actions against an employee for severe kind of emergency type of misconduct, but that's not -- first of all, this is a contract breach claim. So it's really about what the language of the policy says. Secondly, what Dean Datar did, what the Harvard defendants did, was tantamount to a dismissal by stripping the plaintiff of all compensation and benefits and making -- based on a finding that was never made under the procedures, this tiered process in the Discipline Policy. If there had been an emergency removal from campus, a ban from campus for somebody exhibiting dangerous conduct, banning someone from campus is one thing, but they didn't just ban her from campus. There is no allegation in the complaint to suggest they were afraid of her. What they did was they stripped her of all the benefits of her employment, and as alleged in the complaint, when Dean Datar announced all these sanctions, he said to her, when she began to weep, "don't worry, you're a smart woman, you'll find another job."

So the Harvard defendants knew what they did was tantamount to a constructive discharge. She hasn't quit. She hasn't resigned because the damage perpetuated, and I'll save

that for later, but the damage perpetuated by its breach of confidentiality, its defamatory and excessive announcement of retraction notices and her administrative leave have made it -- she's unable to find a job. They didn't give her an opportunity which is also a violation of the duty of good faith and fair dealing because under its own -- every single policy Harvard has, there was a duty of confidentiality, including the Discipline Policy, and I would say it's striking to think the Discipline Policy requires confidentiality in all proceedings which presume that that proceeding is the proceeding where misconduct is determined, grave misconduct for purposes of disciplining of a tenured professor.

Professor Gino does not rely on the substance of the interim policy. I just want to clarify something stated by Mr. Brayley. Professor Gino's complaint does not rely on the substance of the interim policy to state her claims for breach of contract.

THE COURT: Yeah, I got that.

MS. SACKS: Okay. It points to that duty of good faith and fair dealing, an abuse of discretion, and also and I won't -- they didn't follow their own procedure, and while we're not going to argue the facts today because it would be inappropriate of what the investigation report does or does not contain, I will just submit there is ample, you know, in terms of your Honor mentioned in our last hearing that it might be

fair to consider whether there were conflicts between the investigation report and the factual allegations in the complaint, and I would offer your Honor, if it would be helpful, not to make -- not to decide issues of fact but it's a lengthy report, it's a table, if that would be helpful, a quick memo, showing that in fact the investigation report does not refute and actually corroborates the allegations in the complaint.

The complaint also -- plaintiff's complaint also sufficiently alleges claims for defamation against Harvard and Dean Datar. These defamation claims against the Harvard defendants are based on two sets of communications; One, the retraction notices that Harvard sent to plaintiff's publishers and co-authors, and the second is on Harvard's announcement on its website of Professor Gino's administrative leave.

With respect to the retraction notices, Harvard sent excessive retraction notices both to journals that had published plaintiff's papers and to her co-authors. At least one of these retraction notices was entirely unnecessary. As alleged in the complaint, the paper at issue had already been retracted. Also as alleged in the complaint, there was absolutely no need for Harvard to submit retraction notices to the plaintiff's collaborators and co-authors. All of the retraction notices contained express or implied allegations that there were "discrepancies" between "an original data set"

and a data set that Professor Gino had posted on the Open Source Framework. All of the retraction notices contain statements that the data sets that Professor Gino posted on the Open Source Network were not the "original data sets" used for the study at issue. All of the retraction notices said that the "original data" had been altered. These are all false statements of fact. All of these statements obviously impacted for the worst Professor Gino's professional reputation. Under Massachusetts common law, they're what they would be called defamation per se.

Accordingly, where there are false and defamatory statements of fact that can be verifiably demonstrated false, it would be inappropriate at the motion to dismiss stage to not find in plaintiff's favor prior to discovery without full examination of the facts.

THE COURT: Let me ask you. On the one hand you say that the Harvard defendants knew that these statements were false, but the final report says the opposite, and if I'm understanding the Harvard defendants' position, they believed that what the final report, the investigation, concluded was true.

MS. SACKS: Respectfully, your Honor, what the investigators state in their findings and conclusions are hearsay, and even as I've heard counsel for the Harvard defendants, they don't urge that this Court adopt the findings

and conclusions for the truth of the matter asserted.

THE COURT: That's not the issue here. It's your allegation in the complaint that the defendants knew that these statements were false. I'm just trying to get a sense from you where do you get that basis from?

MS. SACKS: Well, for one thing, one kind of quick and easy one is the forensic reports themselves, okay. So some of this, and I don't want to get too into the weeds on the facts, but we know in the forensics reports, when we actually review what's in the investigation report, at least one of the reports Mainstone acknowledged the reports were not conclusive, not probative, because they didn't have the original data set. These papers were so old, as alleged in the complaint, the retention policies at the respective universities where the studies were conducted didn't require the original data to be maintained. Mainstone acknowledges that. I don't have the page number but it's in the investigative report.

So by juxtaposing the forensics report selectively without information about what limited that report and about the exculpatory evidence that Professor Gino submitted and the fact that these reports were not conclusive on the issue of fraud, by limiting that, Harvard defendants did so knowingly. That was a deliberate act of omission.

They also, the Harvard defendants, combined, attached to their retraction notices an appendix without attributing what

were allegations by Data Colada and what were allegations -- and what were reports, these selectively excerpted reports from Mainstone, combined them creating a false and defamatory insinuation that Mainstone's reports were conclusive on findings of fraud, they were not, and the Harvard defendants knew that because if they read the reports, and presumably they did, they would know those reports weren't conclusive and they would know that the original data set -- for instance, in one of the cases, and again, we're not at a motion for summary judgment stage and we're not arguing all the facts, but in one of the studies at issue, we know that Harvard knew that the original data wasn't the original data set, that there was no original data set because one study was conducted on paper. In that case, I believe there was an RA who brought in an Excel spreadsheet. That wasn't the original data set. The original data set was gone.

Insinuations of data tampering in this hodgepodge of materials are as equally as actionable as direct statements because the insinuation that plaintiff was responsible for data tampering is false and obviously damaging to her professional reputation.

Now, at this stage in the pleadings, Professor Gino does not need to plead malice, but there is ample allegations supporting malice including the numerous deviations by Harvard from its own policies. However, both sets of defendants have

contended that Professor Gino is a public figure for purposes of defamation claim.

First of all, Professor Gino has not stipulated that she's a public figure. Professor Gino is not an all-purpose public figure under say Gertz v. Robert Welch or Mandel v. Boston Phoenix. Public figures are persons who have assumed rules of special prominence in the affairs of society and have commonly thrust themselves to the forefront of particular controversies in order to influence the resolution of the issues involved. She's not a general public figure and she is certainly not a limited public figure. Professor Gino did not thrust herself into the center of her own accusations of misconduct. Bringing a lawsuit to defend oneself from claims of dishonesty in a defamation case does not, under Supreme Court precedent, establish that person as a limited public figure.

THE COURT: We have a little bit more than that here. The complaint itself describes her as an internationally renowned scientist. At least in her field, would you agree that she's a public figure in her field?

MS. SACKS: I would say she's a public -- she's a successful academic, and I would respectfully refer your Honor to the U.S. Supreme Court case Hutchinson v. Proxmire, 443 U.S. 111, cited in plaintiff's opposition memorandum. In fact, it was a very similar case. It was a behavioral scientist, highly successful in his field, and the U.S. Supreme Court said that

doesn't make him a general purpose public figure, and similarly with Professor Gino, if you've looked at the allegations, as I'm sure you have, looked at the allegations in the complaint, all of them describe her as winning top awards as a scholar in her circle of business management, publishing papers that are known in her circle of business management executives. These achievements are in a limited circle of academics. She's not an all-purpose public figure under the law.

To the extent that even if one argues or sees an issue of fact in this, the case law in Massachusetts states that -- and there are cases that are referenced in plaintiff's opposition memorandum which again I would respectfully refer your Honor to, they have held on that point that it's a fact-specific inquiry and it's so fact specific and so important in a defamation claim that courts, where there is any issue, at this stage that issue should be decided in plaintiff's favor. Courts in Massachusetts, federal courts, have held that it's so fact-specific that it can't even be decided at the summary judgment stage, but, again, and I won't beat that dead horse here, the plaintiff has alleged facts including the selective limiting and omission with respect to the published retraction notices that do in fact show malice.

In terms of Harvard defendants raised this notion of a conditional privilege as an employer, Massachusetts state law -- courts have held that an employer can lose that conditional

privilege by abusing it, and I would refer your Honor to a case, I would like to give you the citation, MGH, Mass General Hospital -- or I'm sorry, Lopez v. Massachusetts General Hospital, 91 Mass.App.Ct 1128, and it discusses how in all cases an employer can lose the conditional right of publishing even defamatory statements by abuse and that includes reckless and excessive publication as well as malice which in this sense, under the Massachusetts common law, doesn't mean the knowing and reckless publication without regard to truth or falsity, but it means when defamatory words, although spoken on a privileged occasions, were not spoken pursuant to the right and duty which created the privilege but were spoken out of some base ulterior motive.

Here, I know the complaint is lengthy, but it's interesting, one of the allegations, the factual allegations, when Professor Gino complained to the Dean's administrative -- I'm not sure of her title, Jean Cunningham, as the person who works in the Dean's office closely with the Dean and complained that one of her colleagues had appeared to have discussed with Professor Gino's publisher the outcome of the misconduct proceeding, Jean Cunningham, who works with the Dean, said, well, once the retraction notices come out, everybody is going to know. That's, again, I don't want to get too much in the weeds, but retraction notices are different from letters of correction. Retraction notices didn't express concerns about

the data. They expressed accusations of fraud by Professor Gino. That's not a correction of the scientific record.

The announcement --

THE COURT: Just before you go on, when you say the retraction notices were excessive, it just occurred to me I don't fully understand that. Are you saying it's excessive in the number of retraction notices that were sent out or what's in the notice itself, the information?

MS. SACKS: Both. So what was in the retraction notices made accusatory statements of fact entirely unnecessary to correct the scientific record. Two, they disclosed what plaintiff alleges was the erroneous outcome of the misconduct proceeding. Retraction notices are meant to correct the scientific record, not to defame or accuse a researcher of misconduct. In one case, it was entirely excessive where, as I earlier stated, the study at issue had already been retracted for reasons that had nothing to do with Professor Gino.

The other reason it was excessive was to whom Harvard sent the retraction notices. They didn't just send them to the publishers at issue, they also sent them to Professor Gino's co-authors which is wholly unnecessary and not required under Harvard's policy, and as alleged in the complaint, the retraction notices themselves in their substance deviated from Harvard's normal policies on retraction notices. Retraction notices normally, because they do have the potential to damage

a professional scientist, a researcher's reputation, normally the institution including Harvard will work, this is alleged in the complaint, will work with the author of the study and do a collaborative submission of retractions or corrections, whatever the case may be, to the publishing journal. Here, Harvard deviated from that policy and that standard normative practice in the scientific community.

THE COURT: Let's move on to the issues related to the administrative leave announcement.

MS. SACKS: I'm sorry, I couldn't hear.

THE COURT: Let's move on to the issues you raised in connection with the announcement on the website that she's on administrative leave.

MS. SACKS: Okay. So under Massachusetts law, even a true statement of fact can support a claim for libel if the plaintiff proves that the defendant acted with actual malice within the meaning of Massachusetts state law which is Mass General Laws Chapter 231, Section 92l. Under state law, as opposed to the New York Times v. Sullivan standard, actual malice is defined as ill will or malevolent intent, and I refer your Honor to Mullane v. Breaking Media, Inc., 433 F.Supp. 3d 102 D.Mass. 2020.

So, for example, in Noonan v. Staples, which is discussed in plaintiff's opposition memoranda, Staples, the employer, terminated an employee for an alleged violation of employment

policy. The plaintiff's supervisor sent a mass e-mail communication to 1,500 employees. The employer had never done that before. They had never identified an employee in a mass e-mail who had committed misconduct. At the summary judgment stage -- first, I should preface, the statements in the e-mail were all true. The plaintiff had been terminated for a violation of policy. It was undisputed. The issue was malice under state law and whether the -- it was a defamatory statement because it disparaged the plaintiff's professional reputation, but even though true, the facts in that case supported a libel claim under the state law, and the facts, very similar to the present case, were that the employer had never previously sent an e-mail, a mass e-mail identifying a terminated employee, and the employer had e-mailed persons who had no reason to know of the policy violation.

Similarly here, Professor Gino's announcement administratively is true. However, in this case, Dean Datar e-mailed the entire faculty at the Harvard Business School of plaintiff's research misconduct proceeding and connected it to plaintiff's administrative leave. There were so many breaches in confidentiality as alleged in the complaint, the excessive retraction notices that went well beyond Harvard's policy, the scientific norms for such notices, that we can -- the claim supports in this instance, certainly the 12(b)(6) stage, facts showing actual malice within the meaning of state law.

Professor -- is there any other questions on that?

Professor Gino has also sufficiently stated her remaining claims against the Harvard defendants including promissory estoppel. Without getting too much into it, it's alleged in the complaint that Professor Gino was offered other opportunities at different institutions. She relied, to her detriment, on the promises made of a lifetime tenured appointment with procedural protections by a Harvard defendant. She chose to make a career and she has suffered damages because of that reliance. At this stage in the pleadings where the Harvard defendants do not concede that their policies created an enforceable contract, other courts in this circuit and in Massachusetts courts, state courts, a recent case, Edelman v. Harvard, has held that a plaintiff at this stage can plead alternative claims and it's not necessary to dismiss one or the other without further fact finding.

THE COURT: Yeah, I don't think I need anything further on that. Can we move on to the Data Colada defendants?

MS. SACKS: Sure. So the Data Colada motion -- sorry, the motion -- the Data Colada claims primarily -- I'm sorry, the plaintiff's claims against -- I'm just going to call them the Data Colada defendants instead of identifying them by name. The Data Colada defendants concern five sets of publications, four blog posts and one so-called December report. I can go over the facts, the context surrounding that report -- okay, if

you're good on that.

The essence of the Data Colada defendants' arguments is that their statements are immunized as protected opinion based on disclosed non-defamatory facts. Well, first, as a threshold matter, the law does not immunize so called opinions as privileged. To quote Milkovich, even -- well, even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.

So, as I stated previously, it's wholly inappropriate at this stage for Mr. Pyle to testify as to the quality of the data or so-called sorting errors and the quality of his clients' assessment of so-called discrepancies. These are statements of fact that are in dispute and plaintiff has alleged erroneous, and at this stage we're not fact finding. Plaintiff disputes the facts, the false statement of facts disparaging her reputation by calling her a fraud and concluding that she committed fraud and the underlying assertions.

THE COURT: What if instead of using the word fraud, they pointed out various inconsistencies in the data and then opined about it, would that make a difference?

MS. SACKS: I'm sorry. I couldn't hear your Honor. I just couldn't hear you.

THE COURT: I understand. I will speak up a little bit. So let's say they didn't use the word fraud but instead they used the word inconsistencies or discrepancies in the data and here is our interpretation of that.

MS. SACKS: That's a fantastic point, and thank you for asking that question. So thinking of a case, McKee, I believe it's McKee V Cosby, where an attorney questioned the credibility of a plaintiff in that case, a sexual assault case against the defendant, a credibility assumption, a questioning about the quality of data, whether the data is reliable, these are different from questioning whether someone committed an act of falsifying data. So, yeah, that would be very different, and when you read Data Colada -- and I don't want to belabor the issue if you've already -- you have the memorandum, it discusses the statements, but all of them, which are very much related to what's in the December report, they all contain expressions, express and implied, that Professor Gino committed fraud. This is demonstrably false. It's a statement of fact, it's disparaging, and the underlying bases as alleged in the complaint, and it is somewhat complicated and very fact intensive, these four studies, but there is numerous instances where the Data Colada defendants knew or should have known that their statements were false or at least at the minimum with reckless disregard of their truth or falsity, but again, plaintiff does not concede that she is a public figure for

purposes of her defamation claims. Under Massachusetts law, the degree of false in this sense is negligence.

As alleged in the complaint, there are, however, even if -- and, again, plaintiff's position is that it would be inappropriate to make a fact-specific decision on her status for purposes of her defamation claim because the circuit court decisions -- the courts' decisions in the circuit have said it's a fact-specific inquiry, not even appropriate necessarily at the level of summary judgment, but here there are allegations supporting an inference of malice in the terms of New York Times v. Sullivan including that after defaming her in four blog posts, Defendant Simonsohn gave a webinar in which he acknowledged that defendants had no actual evidence of data tampering. Compare that statement to what they stated in the December 2021 report where defendants Data Colada, the Data Colada defendants, submitted a written report to Professor Gino's employer that their report contained direct evidence of fraud and that they were, I don't want to misquote, but they alluded to non-disclosed facts relating to a 2000 -- going back to 2008, an error, when as alleged in the complaint, the Data Colada defendants wouldn't have even known of her data sets because it was a period of time prior to Professor Gino's posting on the Open Source Framework her data which, by the way, she has done voluntarily in all her studies since the Open Source Framework has become available.

The Data Colada defendants also knew that data irregularities occur within the norms of the field of behavioral science with respect to data collection and handling, and in their own blog post concerning other so-called anomalus data, and this is discussed in plaintiff's opposition memorandum in opposition to the Data Colada defendants' motion, they've acknowledged on blog posts dealing with anomalus data, data discrepancies that they wanted to be very careful about discussing discrepancies in terms of concerns about the data and not concerns about the scientist at issue and they acknowledged that in the field of behavioral scientists multiple people handle data, and as alleged in the complaint, Professor Gino alleges numerous reasons for such discrepancies which do not -- which are not supportive of accusations of fraud.

The other point I'd like to address is the Data Colada defendants' statements are not part of scientific debate. It is not scientific debate whether or not a researcher is a fraud. That's not science. The cases that Mr. Pyle has cited, ONY, Inc. v. Cornerstone Therapeutics, that case involved an unsettled matter of scientific debate concerning how to draw conclusions from undisputed non-fraudulent data. That was a scientific debate. There was nothing alleged about fraud and it was all about how to interpret the data.

The other case that's inapposite that Mr. Pyle cited was

Saad v. American Diabetes Association. That case involved not a retraction notice but a so-called letter of concern and it was published in a peer-reviewed medical journal that expressed concerns about the data, the quality of the data, but it contained no false or defamatory statements directed at the plaintiff in that case. They're completely inapposite.

This is a common law case of defamation. Professor Gino has been accused of falsifying data. This is verifiably true or false. It impacts her reputation. The case should go to discovery. It should not be decided at this stage.

I won't address the point about public figure anymore unless you would like to hear more on that.

I would just say with respect to the other claims against Data Colada, alleged conspiracy, that claim should survive defendants' motion because the underlying claim of defamation should survive this motion, and there are allegations of fact that support an arrangement between Harvard and the Data Colada defendants and these include the timing of the publication of the broadcast -- I'm sorry, the blog post. On June 14 or June 13, 2023, Dean Datar, on or about that date, put Professor Gino on administrative leave. Four days later Data Colada began to publish a succession of blog posts, pretty much identical to the so-called findings of the investigative report.

There are, besides the timing, there is the indicia of malice by both sets of defendants. The allegations that show

the secrecy with which Data Colada's initial allegations were shrouded in by the Harvard defendants also is suggestive of a conspiracy.

THE COURT: Secrecy meaning not sharing information with Professor Gino that they're looking into this, is that what you mean? I'll speak up.

MS. SACKS: Yeah, I didn't understand.

THE COURT: So when you say secrecy, are you referring to the fact that Harvard did not share with Professor Gino for the first three months that they were looking into this allegation?

MS. SACKS: That's part of it and also the point, and these are facts, and it is a lengthy complaint, as alleged in the complaint, Professor Gino's supervisor, Professor Gary Pisano, I think he's the Dean there, wanted Harvard to share with plaintiff the allegations so she could respond which would have been pursuant to its usual processes and was told by the Dean's -- by the Dean and/or his support person in the complaint, Jean Cunningham, not to tell Professor Gino and Harvard did not vet this policy, and as alleged in the complaint, Harvard was very concerned about publications that could damage its own reputation as an institution of higher learning, and so, as alleged in the complaint, there is a reasonable inference that in exchange for Data Colada postponing its publications to avoid commentary that could

potentially disparage the university, Harvard came up with this brand new policy. Again, at this early stage, and the defendants' counsel say, oh, that's improbable, it's absurd, well, at this early stage, it's is not a probability requirement, it's a plausibility requirement, and the plaintiff has sufficiently alleged allegations that support a plausible claim of conspiracy.

Plaintiff has also plausibly alleged tortious interference where plaintiff has alleged that defendants, the Data Colada defendants, knew or were reckless about the truth or falsity of their allegations of fraud. They nonetheless went to her employer with accusations of fraud. They knew that she was employed by Harvard. Where there is an improper purpose, she has stated a claim for tortious interference based on her employment contract.

So, unless there are any other questions, respectfully, your Honor, plaintiff asks that the Court dismiss all of the defendants' motions.

THE COURT: Thank you. Mr. Brayley, Mr. Pyle, I know you're about to jump up. I don't think I need any further argument, but if you have something that you're dying to get out --

MR. PYLE: I have about fifteen seconds.

MR. BRAYLEY: I have roughly the same, if I may.

THE COURT: All right, go ahead.

MR. BRAYLEY: Thank you, and I will try very hard not to repeat anything that's in our briefs. I think one of the most clarifying things from this exchange for your Honor is the point that Professor Gino's counsel made that the interim policy is an extra-contractual policy. In other words, it is clear that there can be no breach of contract or implied covenant of good faith and fair dealing based on alleged failure to follow the interim policy because if the interim policy --

THE COURT: I don't think that's what they're saying.

MR. BRAYLEY: Well, I heard her say extra-contractual policy so that sounded to me like there was a concession and it's not a contract.

I think it would be important, your Honor, to point out that there were some assertions made about allegations of fraud that simply are not backed up by the documents. I would encourage your Honor when deciding on these motions to look carefully on what was and what was not said and, for example, the letters sent to the journals which very clearly do not state and do not accuse Professor Gino of anything, they express concerns about data and they express a suggestion that there might be retractions from journals. I think that's an important distinction that was perhaps a little bit unclear from this discussion.

Last two points. Two cases were raised that I think are

important to distinguish. Hutchinson v. Proxmire, this is the Supreme Court case involving an academic. In that case, the academic was not a public figure. This was not someone of any prominence until a United States senator plucked him out of obscurity to criticize the cost of their research and that's what the Supreme Court found. I think that's utterly distinguishable from this case where the first three pages of the complaint are replete with excessive statements about her public figure status.

Next, similarly, Noonan v. Staples was extensively discussed. In that case also the subject of the allegedly defamatory statements was not a public figure. In Massachusetts when the subject of the statement is a public figure, the state idiosyncratic definition of actual malice or ill will simply does not apply for public figure. It's the New York Times v. Sullivan test.

Finally, Sullivan v. Western New England and Barry v. Emmanuel College are not comparable to this case. Sullivan involved termination of employment which unambiguously from the complaint is not at issue here, and Barry v. Emmanuel College pled violations of contractual policies which again is not at issue here. Thank you very much.

MR. PYLE: Thank you, your Honor. You heard a moment ago from plaintiff's counsel that my client, Mr. Simonsohn, did a webinar where he said that they had no evidence of data

falsification after the Harvard report came out and after the blog posts were published, whereas previously he said he had direct evidence of it. That is, I regret to say, a pattern of misquoting of what my clients said in order to manufacturer allegations of actual malice. Mr. Simonsohn did not say they had no evidence of data falsification. What he said was we don't know who did the data falsification which is exactly what they said in the Harvard report. They said in the Harvard report, in fairness to Professor Gino, while our evidence can rule out co-authors as people who produced the fraud, it cannot rule in necessarily malfeasants by Professor Gino. It could have been a research assistant who did this. You should look into it, Harvard. That is the precise opposite of actual malice. It shows that my clients were being careful with what they said.

Second point, there is this argument that this isn't about scientific debate. This is about an accusation of fraud against fellow scientists. Well, the Cassava Sciences court rejected exactly that argument. In that case, the Alzheimer's drug developer said we're not having a discussion about drug effectiveness. You're alleging that we manipulated our data to get a better result for our Alzheimer's drug, but the court said, no, no, no, and you impune the motives and integrity of Cassava and accused them of intentional wrongdoing. That's not scientific debate. The Court said, oh, yes, it is, and whether

plaintiff disagrees with defendant's inferences or whether they might reflect unfavorably on the plaintiff does not determine whether they qualify as scientific inferences worthy of protection under the First Amendment.

And the third point, the same thing was said Milkovich which counsel cited as well. Milkovich says if a person states the basis of their opinion, it doesn't matter how many vituperate or unfair that opinion might be, it doesn't matter they use words like fraud or in my other example alcoholic to summarize their conclusion. What matters is that the reader understands what the basis of that conclusion is, and with all five statements that my clients are being accused of defaming Professor Gino with, they made the basis of their conclusions perfectly clear. That's why this case has to be dismissed. Thank you, your Honor.

THE COURT: All right. Thank you, everyone.

MR. PYLE: If the Court would like, I'm happy to pass up a copy of that case that I just referenced.

THE COURT: The Cassava case?

MR. PYLE: Yes.

THE COURT: Sure. Thank you very much. I will take this under advisement.

(Adjourned)

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CERTIFICATION

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter to the best of my skill and ability.

/s/Jamie K. Halpin_____ May 17, 2024

Jamie K. Halpin, RPR, RMR Date

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